

# Nudging Testators Toward Holistic Estate Planning: Overcoming Social Squeamishness on the Subjects of Money and Mortality

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## I. INTRODUCTION

*"Riches may enable us to confer favours, but to confer them with propriety and grace requires a something that riches cannot give . . . ."*

— Charles Caleb Colton<sup>1</sup>

A new television program recently premiered on Investigation Discovery (ID), one of the Discovery Channel's crime-focused cable networks.<sup>2</sup> The program has been given the rather salacious title, "The Will: Family Secrets Revealed," and the pilot episode lives up to its name. As the show unfolds, the narrator presents the Tipton family: an intestate matriarch, Kitty Tipton-Oakes, leaving a \$300,000 estate; three missing adopted sons, two of whom have not spoken to their mother in years, and one who believes that he was not, in fact, adopted; a woman who may or may not be Kitty's natural child; and a legacy of child abuse, domestic strife, and family secrets.<sup>3</sup> Complications ensue when it is discovered that none of Kitty's sons were legally adopted and thus cannot inherit under the local descent and distribution statute.<sup>4</sup> What follows is a lengthy legal battle, not only pitting

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<sup>1</sup> CHARLES CALEB COLTON, *LACON: OR MANY THINGS IN FEW WORDS; ADDRESSED TO THOSE WHO THINK* 105 (1865), available at <http://books.google.com/books?id=CjACAAAQAAJ&print>.

<sup>2</sup> Linda Stasi, *Out of the Will: Death Is Only the Beginning of New Series*, THE NEW YORK POST, Dec. 16, 2009, available at [http://www.nypost.com/p/entertainment/tv/out\\_of\\_the\\_will\\_E7JVvUVrq7sy17Kw5NITwL](http://www.nypost.com/p/entertainment/tv/out_of_the_will_E7JVvUVrq7sy17Kw5NITwL). The pilot show premiered at 9:00 p.m. on Thursday, December 17, 2009 on Investigation Discovery. *Id.* The show airs Wednesdays at 9/8c on Investigation Discovery.

<sup>3</sup> *The Will: Family Secrets Revealed*. (Investigation Discovery television broadcast Dec. 17, 2009). The show's biggest reveal is that Kitty's estranged husband, the successful 1960s jazz musician Billy Tipton, was, in fact, born a woman. *Id.* Billy lived as a man until his death some years prior to Kitty's, purportedly to further his career in the male-dominated jazz industry. *Id.*

<sup>4</sup> *Id.*

the Tipton sons against state code and a possible sister biologically related to their mother, but eventually against each other.<sup>5</sup>

Although few families can lay claim to a domestic drama as sensational as that of the Tiptons,<sup>6</sup> the sad fact reflected by this new series is that interfamilial will and inheritance contests have become an acceptable—if not common—occurrence in the United States in families with adult children.<sup>7</sup> The results of such contests can be devastating to both the “social fabric of families . . . creat[ing] decades of ill-will,”<sup>8</sup> and the estate itself.<sup>9</sup> The aftermath of the Tipton legal quagmire is typical of many others: the family remains estranged, and the \$300,000 estate was devoured by court costs and attorneys’ fees.<sup>10</sup> This destruction is all the more upsetting because, although lawsuits like the Tiptons’ inevitably involve disputed sums of money, at their core, will contests often serve as an inadequate means of resolving or simply continuing ongoing family arguments.<sup>11</sup>

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<sup>5</sup> *Id.* William Tipton, who believed himself to be the biological, rather than adopted, son of Kitty Tipton-Oakes, claimed the entire estate during court proceedings. After opposition from his two brothers, a blood test revealed that he had no biological relationship to his adoptive mother. *Id.*

<sup>6</sup> Although, the fact that the program is serial suggests that more than a few families can compete.

<sup>7</sup> Melissa Street, Note, *A Holistic Approach to Estate Planning: Paramount in Protecting Your Family, Your Wealth, and Your Legacy*, 7 PEPP. DISP. RESOL. L.J. 141, 142 (2007).

<sup>8</sup> Ronald Chester, *Should American Children Be Protected Against Disinheritance?*, 32 REAL PROP. PROB. & TR. J. 405, 409–10 (1997) (quoting Jeffrey P. Rosenfeld, *Will Contests: Legacies of Social Change*, in INHERITANCE AND WEALTH IN AMERICA, 184 tbl.8.4 (Robert K. Miller & Stephen J. McNamee eds., 1998)).

<sup>9</sup> See, e.g., Lela Porter Love, *Mediation of Probate Matters: Leaving a Valuable Legacy*, 1 PEPP. DISP. RESOL. L.J. 255, 258 (2001) (“Testators and trustors who spent a lifetime accumulating assets do not want those assets wasted on expensive probate litigation.”). Notably, in the succession of family businesses, “personal interactions among successors are six times more [monetarily] detrimental . . . than transfer taxation.” Mary F. Radford, *Advantages and Disadvantages of Mediation in Probate, Trust, and Guardianship Matters*, 1 PEPP. DISP. RESOL. L.J. 241, 251 (2001) (quoting Michael D. Allen, *Succession Strategies for the Family Business*, A.L.I.-A.B.A. EST. PLAN. FOR THE FAM. BUS. OWNER COURSE OF STUD. MATERIALS 4 (Mar. 12, 1998)).

<sup>10</sup> *The Will: Family Secrets Revealed*. (Investigation Discovery television broadcast Dec. 17, 2009). All three brothers expressed chagrin at this outcome. *Id.*

<sup>11</sup> See, e.g., Street, *supra* note 7, at 143 (citing Lela Porter Love, *Mediation of Probate Matters: Leaving a Valuable Legacy*, 1 PEPP. DISP. RESOL. L.J. 255, 262 (2001) (“Often parties dig in on money demands when what they want is recognition for their efforts or their suffering, an apology, a thank you, or a sign of love or affection”) and Susan N. Gary, *Mediation and the Elderly: Using Mediation to Resolve Probate Disputes Over Guardianship and Inheritance*, 32 WAKE FOREST L. REV. 397, 416 (1997)). “Of

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In an attempt to avoid the time, expense, and emotional drain of an interfamilial court proceeding, many probate lawyers have used mediation techniques to resolve issues arising post-mortem; this method of alternative dispute resolution “has been remarkably successful in relationally-sensitive areas of the law.”<sup>12</sup> Others, however, have begun to make “preemptive strike[s]”<sup>13</sup> on potentially contentious gift schemes during the estate planning period through a process known as holistic estate planning.<sup>14</sup>

The critical difference between traditional and holistic mediation is timing. Holistic estate planning adopts the same strategies used in post-mortem mediations, but does so much earlier—in the initial stages of the estate planning process, and perhaps many years before the testator will actually pass away.<sup>15</sup> During the holistic mediation process, the testators and their adult beneficiaries—typically a family of parents and grown children—participate in a series of conversations.<sup>16</sup> These conversations—primarily facilitated by a family systems specialist<sup>17</sup> with the help of the estate planner to explain any purely legal or financial matters<sup>18</sup>—allow all family members to “discuss their views openly, clear up misperceptions and misunderstandings, and resolve estate and trust conflicts by building consensus.”<sup>19</sup> Significantly, this process not only occurs before any conflict

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course some beneficiaries are just interested in a bigger piece of the inheritance pie, but many times, the money is not so much at issue as are the elements of fairness and love in receiving a similar portion to that of other beneficiaries.” Street, *supra* note 7, at 143, n. 20.

<sup>12</sup> Street, *supra* note 7, at 144 (citing Susan N. Gary, *Mediation and the Elderly: Using Mediation to Resolve Probate Disputes Over Guardianship and Inheritance*, 32 WAKE FOREST L. REV. 397, 389 (1997)).

<sup>13</sup> *Id.*

<sup>14</sup> David Gage, et al., *Holistic Estate Planning and Integrating Mediation in the Planning Process*, 39 REAL PROP. PROB. & TR. J. 509, 510 (2004).

<sup>15</sup> See *id.*, at 510–11.

<sup>16</sup> These conversations, depending on the needs and availability of the family, can take place all at once during an event such as a “family retreat,” or over a more extended period of time. *Id.* at 512.

<sup>17</sup> Gage seems to use the term “family systems specialists” to refer to any modern marriage or family therapist. Family therapy is a division of psychotherapy emphasizing family relationships as one aspect of psychological health. Gage stresses that family systems specialists can “bring valuable psychological perspectives” to the holistic estate planning process. Gage, *supra* note 14, at 519–20. For more information on family therapy, see generally HANDBOOK OF FAMILY THERAPY Vol. 2 (Alan S. Gurman & David P. Kniskern, eds., Brunner/Mazel 1991).

<sup>18</sup> Gage, *supra* note 14, at 510–11.

<sup>19</sup> *Id.* at 510.

over the estate plan has developed, thus forestalling post-mortem litigation,<sup>20</sup> but may also inform the estate plan itself, as parents respond to their children's goals, concerns, or financial needs.<sup>21</sup>

The crux of holistic estate planning, and the reason for its great success in anticipating and preventing post-mortem family conflict,<sup>22</sup> is its encouragement of full and frank communication among family members on a subject that is often never discussed between parents and children: money. Children in families with a significant—or even comfortable—level of wealth often grow up uncertain of what their parents do for a living, much less how much income that living generates. While children in their teens and twenties may have some generalized idea of their family's financial position or day-to-day purchasing ability, they will almost certainly be unaware of specifics: debts and other obligations, income generated or lost through capital assets, retirement savings or lack thereof, etc.

While much of this secrecy is practical in children's formative years—children have no need to understand complex family finances even in general terms, parents don't want to be badgered for spending money, and there is, certainly, the ever-present fear that Junior might broadcast to his friends how many zeroes are on his Daddy's paycheck—it often continues beyond the age when adult children are financially independent (often with their own families) out of family or social custom.<sup>23</sup> Many adult children worry that they will be perceived as greedy if they ask parents about plans to transfer

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<sup>20</sup> *Id.* at 511 (“In many post-death mediations, mediators discover that most causes of estate contests could have been identified prior to the parents’ deaths, but were missed during the planning process.”).

<sup>21</sup> *Id.*

<sup>22</sup> See generally Gage, *supra* note 14; Gary D. Williams, Note, *Weighing the Costs and Benefits of Mediating Estate Planning Issues Before Disputes Between Family Members Arise: The Scale Tips in Favor of Mediation*, 16 OHIO ST. J. ON DISP. RESOL. 819 (2001); Street, *supra* note 7.

<sup>23</sup> See, e.g., JEAN STEIN, *EDIE: AMERICAN GIRL* 6–7, (George Plimpton ed., Grove Press 1982). This memoir of Andy Warhol's infamous associate includes the following quote from Edie Sedgwick's cousin discussing the discomfort involved in taking an acquaintance to the Sedgwick homestead in Massachusetts. The book discussed is Edie's grandfather's work, entitled *In Praise of Gentlemen*. “I remember at one point Norman asked me where all the Sedgwick money came from—a question he never would have asked if he had read Babbo's book carefully: you're not supposed to ask things like that. And that's what I told him—that I didn't really know, it's just there, and that he shouldn't ask . . . .” See also Gage, *supra* note 14, at 528–30 (detailing two actual instances where a lack of communication about a parent's net worth and estate plan needlessly led to emotional tumult and sibling estrangement).

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money at death.<sup>24</sup> Parents, in turn, worry that the certainty of a future inheritance will encourage idleness,<sup>25</sup> or that knowledge of an estate plan will force them to “deal with the . . . complex and sometimes irrational feelings of family members.”<sup>26</sup>

Of course, the unpleasant specter of death looming over the estate planning process is as real and problematic as that of family tension over the forthright discussion of money.<sup>27</sup> The majority of Americans die without a will.<sup>28</sup> Although this percentage decreases as the size of an individual’s gross estate increases,<sup>29</sup> a significant proportion of individuals at all wealth levels

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<sup>24</sup> Gage, *supra* note 14, at 528.

<sup>25</sup> *Id.* at 515.

<sup>26</sup> *Id.* at 517. *See also id.* at 518–19 (“Parents who have never had open conversations with their grown children may make unwarranted assumptions about their children’s situations and likely reactions to their estate plans.”) Skirting these uncomfortable conversations in an attempt to avoid conflict often backfires hideously and irreversibly after a parent’s death. *Id.* at 529–30. Consider the following case study:

A . . . mother . . . with one daughter and one son decided to leave her one million-dollar estate to her daughter because of the wide disparity in the siblings’ net worths. She did not tell either one of them for fear the son would be angry, and as it turned out, she was right . . . . He claimed his anger resulted from the fact that his mother and sister were plotting behind his back, and he assumed his sister had talked his mother into the plan. He said the money was insignificant to him and that he would have been happy for his sister . . . if only he had been consulted.

Now, over a decade later, he speaks to his sister only when necessary. The son’s memories of his mother are tainted . . . .

A potential conflict between the mother and son became an actual conflict between the brother and sister—one that, [for over ten years], has been irreconcilable.

*Id.* at 529–30. Estate attorneys might also be confronted with parents who claim that they do not care whether post-mortem estate squabbling occurs. This is typically a defense mechanism indicating fear that they are incapable of dealing with potential family conflict. *Id.* at 517.

<sup>27</sup> *See infra* note 29.

<sup>28</sup> DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 71 (6th ed. 2000). A more recent Harris poll places the total number of American adults without wills at 65%. Scott James, *Dying Alone Intestate Places Burden on the County*, NEW YORK TIMES A17A, July 23, 2010, available at <http://www.nytimes.com/2010/07/23/us/23bcjames.html>.

<sup>29</sup> LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS 29–30 (3d ed. 2002) (“In terms of wealth, 72.3% of persons with estates valued between \$0 and \$99,000 do not have wills, 49.8% with estates between \$100,000 and \$199,000 do not have wills, but only 15.4% with estates between \$200,000 and \$1 million do not have wills.”). *See also* DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 59, n. 1 (7th ed. 2005) (“In national polls of exclusively older and wealthier groups, up to 69 percent of respondents report having

neglect to make plans for the transfer of wealth at death. One of the reasons commonly given for this neglect is that estate planning inevitably forces the planner to contemplate his own mortality.<sup>30</sup>

Holistic estate planning exacerbates this reflection on two fronts. Firstly, it prolongs the estate planning process to allow for meaningful input from all interested parties.<sup>31</sup> Secondly, it involves the entire family in the estate planning process,<sup>32</sup> thus not only forcing the testator to consider his own death, but also obliging family members to consider the death of a loved one. Adult children may be lesser equipped to deal with this consideration than their parents.<sup>33</sup> Parents, in turn, might wish to shield their children from unpleasant pecuniary necessities.<sup>34</sup>

Candid conversations both highlighting and incorporating the topics of money and mortality are crucial to the accomplishment of holistic estate planning's goals.<sup>35</sup> Failing to share estate plans openly within a family will not only frustrate the estate planning process,<sup>36</sup> but lead to feelings of distrust

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wills, and if one further separates the respondents by income, even higher percentages of the wealthiest subgroups report having wills”).

<sup>30</sup> Mark Glover, *Formal Execution and Informal Revocation: Manifestations of Probate's Family Protection Policy*, 34 OKLA. CITY U. L. REV. 411, 438 (2009). See also Gerry W. Beyer, *The Will Execution Ceremony—History, Significance, and Strategies*, 29 S. TEX. L. REV. 413, 419 (1988) (“[M]any individuals procrastinate making a will since the execution of a will is an admission of their mortality”); Thomas L. Shaffer, *The “Estate Planning” Counselor and Values Destroyed By Death*, 55 IOWA L. REV. 376, 377 (1969) (“[P]ersonal death is a thought modern man will do almost anything to avoid.”).

<sup>31</sup> Gage, *supra* note 14, at 510.

<sup>32</sup> *Id.*

<sup>33</sup> See DEBRA UMBERSON, *DEATH OF A PARENT: TRANSITION TO A NEW ADULT IDENTITY* 6 (2003):

Before we have experienced the death of a parent . . . we may implicitly believe that once we reach adulthood . . . our development is more or less complete. . . . The research on which this book is based, however, demonstrates that the loss of a parent has profound and wide-ranging consequences for most of us.

<sup>34</sup> See *id.* at 14 (“Parents feel like parents no matter how old their children are.”).

<sup>35</sup> Street, *supra* note 7, at 146. See also Gage, *supra* note 14, at 533 (“By addressing underlying issues, talking openly, and eliminating surprises, family meetings can establish the expectation that siblings will deal openly and collaboratively with issues that arise after the parents have died.”).

<sup>36</sup> Gage, *supra* note 14, at 518–19 (stating that estate plans are more likely to be contested when attorneys have incomplete or erroneous information).

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among its members.<sup>37</sup> Nevertheless, many potential testators and beneficiaries may be unwilling to take advantage of holistic estate planning simply to avoid these topics.<sup>38</sup> Even within those families that do use this method of mediation, individual family members may be reluctant to participate wholeheartedly in the process for this reason.<sup>39</sup> Unexpressed thoughts, opinions, and emotions cannot be meaningfully incorporated into the estate planning process, and may crop up later in the form of will contests or other interfamilial litigation.<sup>40</sup>

Therefore, an estate planner who hopes to encourage a particular family toward holistic estate planning—and, further, to make full use of the process's benefits—must first overcome the innate unease many families suffer when faced with serious conversations detailing such private subjects as personal finances and the impending loss of a loved one. This note attempts to offer estate planners practical advice in doing so. Part II will take a more in-depth look at the holistic estate planning process, particularly examining those situations in which it is most helpful in preventing estate contests. Part III will scrutinize common social conventions against discussions of money and death, and the real problems such conventions pose to holistic estate planners. Part IV will offer practical instructions to estate planners for overcoming these social conventions in a way that will encourage testators toward holistic estate planning and allow them to fully avail themselves of the process.

## II. BRASS TACKS

Although holistic estate planning is a fairly simple process, it is also a relatively new one.<sup>41</sup> Accordingly, it behooves any estate planner to

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<sup>37</sup> *Id.* at 533 (“Withholding [inheritance] information creates a breeding ground for suspicion, misunderstanding, and even paranoid thinking; sharing information is an antidote for many ills that befall families. . .”).

<sup>38</sup> *See id.* at 516–17.

<sup>39</sup> Street, *supra* note 7, at 157. Street also lists the fear of disappointing one's parents and the apprehension of dissatisfaction with the final plan among reasons for beneficiaries' reticence. *Id.*

<sup>40</sup> *See* Gage, *supra* note 14, at 518 (cautioning holistic estate planners to be on guard for any participant “harboring a hidden agenda or sitting on an explosive resentment”).

<sup>41</sup> *See* Street, *supra* note 7, at 144 (quoting John A. Gromala, *The Use of Mediation in Estate Planning: A Preemptive Strike against Potential Litigation* (1999) available at [www.mediate.com/articles/estate.cfm](http://www.mediate.com/articles/estate.cfm) (“Mediation in conflict resolution is a profession in its adolescence. Mediation in estate planning is in its infancy.”)).

familiarize himself with the process at its most fundamental level,<sup>42</sup> as well as the specific family situations in which holistic estate planning is particularly advantageous.<sup>43</sup>

### A. *The Process of Holistic Estate Planning*

*"When they fought, at least it was with fists and bottles and furniture,  
not lawyers."*

– Christopher Isherwood<sup>44</sup>

Holistic estate planning begins in very much the same way that typical estate planning does: An estate planner approached by a client (or, in many cases, parents with adult children) will conduct an initial interview, posing questions about the couple's intended beneficiaries, assets, and goals for their transfer.<sup>45</sup> If an estate planner suggests the use of holistic processes and the testators agree to do so, a mediator will be introduced.<sup>46</sup> The mediator will then continue the interview process, determining the principal goals of the wealth transfer, but focusing primarily on the "unique characteristics" of the subject family.<sup>47</sup> After the mediator is thoroughly acquainted with the family dynamic, the testators, estate planner, and mediator will make a decision regarding which family members to include in the process.<sup>48</sup> Although the testators may decide to exclude certain family members,<sup>49</sup> "bringing all the appropriate adult parties into the process helps achieve the best possible result with the greatest buy-in and the least chance of having the final plan be contested."<sup>50</sup>

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<sup>42</sup> See Gromala, *supra* note 41, at 31. Indeed, Gromala advocates more than mere familiarization with the process. For his additional suggestions, see *infra*, note 116.

<sup>43</sup> *Id.* ("The services of a mediator should be considered if any of the following scenarios is present: mentally or physically challenged child; economic disparity among heirs; divorce and multiple marriages; inherited or other separate property; a child who is caring for a parent; testator is either very indecisive or dogmatic; entrepreneurial or closely held business.").

<sup>44</sup> CHRISTOPHER ISHERWOOD, *A SINGLE MAN* 13 (1964).

<sup>45</sup> Street, *supra* note 7, at 146.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 146, n.45 (noting that the mediator's approach will vary in each case because each family possesses unique characteristics and unique interactions).

<sup>48</sup> Gage, *supra* note 14, at 538.

<sup>49</sup> *Id.* Gage notes the possibility of excluding, in certain cases, children's spouses or a family member with a substance abuse problem.

<sup>50</sup> *Id.*



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One of the advantages of using mediation techniques in the holistic estate planning process are their flexibility—there are no mediation procedures to which adherence is mandatory, and, therefore, the process can be adapted to suit the unique purposes of each family.<sup>51</sup> However, the majority of mediators will follow the general mediation schema: (1) introduction, (2) parties' openings, (3) caucus, and (4) settlement.<sup>52</sup> The introduction allows the mediator to explain the process and its rules to all participants.<sup>53</sup> The parties' openings—which in a more typical mediation would give each opponent an opportunity to state his case—serve as a forum for family members to explain their hopes and fears regarding the estate planning process.<sup>54</sup> After all family members are given a thorough chance to express themselves, each will meet in caucus with the mediator.<sup>55</sup> The purpose of these confidential meetings is to allow parties to speak freely about issues that can be sensitive, painful, or upsetting.<sup>56</sup> Finally, the mediator gathers all parties together once again. The group as a whole discusses the most critical

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<sup>51</sup> See, e.g., Mary F. Radford, *An Introduction to the Uses of Mediation and Other Forms of Dispute Resolution in Probate, Trust, and Guardianship Matters*, 34 REAL PROP. PROB. & TR. J. 601, 624–625 (2000); Street, *supra* note 7, at 147.

<sup>52</sup> Ray D. Madoff, *Mediating Probate Disputes: A Study of Court Sponsored Programs*, 38 REAL PROP. PROB. & TR. J. 697, 700–01 (2004); Street, *supra* note 7, at 147.

<sup>53</sup> Street, *supra* note 7, at 147 (citing Madoff, *supra* note 52, at 701). Two common points of emphasis are that the process is voluntary and parties can leave at any time, and that the mediator is to serve as a facilitator, not a decisionmaker. See also Radford, *supra* note 51, at 626 (“Typical ground rules include: (1) Do not interrupt the other party; (2) Be respectful of the other party; (3) Maintain flexibility; (4) Retain confidentiality.”).

<sup>54</sup> Madoff, *supra* note 52, at 701.

<sup>55</sup> *Id.*

<sup>56</sup> Radford, *supra* note 51, at 627 (“In some cases the bulk of the mediation occurs through private caucusing with the mediator acting as a ‘shuttle diplomat.’”) (citing Nadine DeLuca Elder, *A Mediation Primer for the Solo or Small Firm Practitioner*, 4 GA. BAR J. 38, 42 (1998)). See also Gage, *supra* note 14, at 536:

People involved in mediation tend to be extremely open and candid with mediators because everyone gets private time with the mediators. Family members often reveal their worst fears and suspicions, their angriest feelings, and their wildest ideas about possible resolutions to problems. The family members recognize that part of the mediators' job is to help them sort through what is real and what is not, and what is productive and what is not.

In the holistic estate planning process, the mediator can not only caucus with individual family members, but with “various groups within an entire family such as siblings and grandchildren” who may have common agendas or concerns. Street, *supra* note 7, at 148.

issues, and the mediator encourages all parties toward a resolution.<sup>57</sup> Notably, although the mediator may urge a resolution to any family conflicts, and may, in fact, suggest several possible solutions, it is the parties themselves who must finally agree upon a result.<sup>58</sup>

Since it is the mediator, and not the estate planner, who takes a central role in the holistic process, the estate planner's primary function in holistic estate planning is to facilitate its instigation. This is most effectively accomplished during an estate planner's initial interview with the testators.<sup>59</sup> Such interviews traditionally serve to inform the estate planner of the client's wishes, and typically end with recommendations regarding the next stage of the process.<sup>60</sup> "Whether intentionally or not, the attorney's questions [during the initial interview] signal to the clients the appropriate content of the planning process."<sup>61</sup>

Questions that will correctly orient parents to the holistic estate planning process will not merely maintain a narrow focus on family finances and methods of tax avoidance,<sup>62</sup> but will branch onto the broader topics of "family, goals, and assets."<sup>63</sup> Many estate planners fail to mention inherent domestic consequences of wealth transfer at death. Those that do will help their clients "appreciate the full range of issues they will need to address, as well as the importance of getting input from their children."<sup>64</sup> Once parents understand the full impact of their decisions, they will be more amenable to an estate plan that operates holistically—incorporating the hopes, fears, values, and relationships that define a distinctive family unit.<sup>65</sup>

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<sup>57</sup> Street, *supra* note 7, at 147 (citing Radford, *supra* note 51, at 627).

<sup>58</sup> Street, *supra* note 7, at 147, n.56 (citing Radford, *supra* note 51, at 627 ("The goal is for the parties, with the aid of the mediator, to structure mutually acceptable results.")).

<sup>59</sup> See Gage, *supra* note 14, at 530 ("[t]he initial interview between client and attorney is a critical time for defining the client's understanding, expectations, and wishes for the process ahead.").

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* ("A narrow, financially focused interview conveys the sense that estate planning should be narrowly defined.").

<sup>63</sup> *Id.* at 530–31.

<sup>64</sup> See Gage, *supra* note 14, at 530–31 (noting that the questions that will best underscore the familial aspects of estate planning have a tripartite focus: individuals, relationships within the family, and the estate process itself). Many estate plans are wholly financial, and the conception of an "estate" in the canon of probate law is, essentially, a plutonic one. However, this conception may not be appropriate in many cases. See *id.* at 515 (stating that in some cases, a parent's legacy may have emotional significance equal or greater than its financial impact).

<sup>65</sup> *Id.* at 531.

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### *B. Appropriate Circumstances for Incorporating a Holistic Estate Plan*

*"The great advantage of living in a large family is that early lesson of life's essential unfairness."*

— Nancy Mitford<sup>66</sup>

Relationships between siblings are complicated affairs. During childhood, they are often fraught with jealousy, resentment, and competition for parental love and attention.<sup>67</sup> These attitudes do not necessarily dissipate as children grow into adulthood. Indeed, a substantial portion of will contests involve siblings contesting a will which bequests most of the testator's estate to one child over the others.<sup>68</sup> "In many cases, there is little doubt that the testator in fact favored one child as a result of a close relationship with that child or a poor relationship with the others."<sup>69</sup>

However, reasons for unequal treatment are many and varied. One sibling may possess extraordinary assets, suffer from mental or physical illnesses that require lifetime care, or devote extensive time and energy to a parent in his waning years.<sup>70</sup> In other cases, one sibling may simply be addicted to drugs or alcohol, or estranged from the family. When divorce and remarriage enter the mix, one parent may wish to leave all or most of his money to his biological children rather than dividing it equally among children and stepchildren.<sup>71</sup> Complicated estate plans are more often the result of complicated family structures than of sizeable family wealth.<sup>72</sup>

Even when parents have the best intentions for their testamentary transfers of wealth, the mere perception that one sibling is favored or disfavored in a parent's estate planning can lead to bitter family conflict, and

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<sup>66</sup> NANCY MITFORD, *THE PURSUIT OF LOVE AND LOVE IN A COLD CLIMATE* 12 (2001).

<sup>67</sup> See, e.g., CLOE MADANES WITH CLAUDIO MADANES, *THE SECRET MEANING OF MONEY: HOW TO PREVENT FINANCIAL PROBLEMS FROM DESTROYING OUR MOST INTIMATE RELATIONSHIPS* 51 (1994).

<sup>68</sup> Thomas Phillip Boggess V, *Cause of Action to Invalidate Testamentary Device on Ground of Undue Influence in Its Execution*, 27 *CAUSES OF ACTION* 2d 469 at § 3 (2005) (citing Ross & Reed, *WILL CONTESTS* (2d ed.) § 7:14).

<sup>69</sup> Boggess, *supra* note 68, at § 3.

<sup>70</sup> Street, *supra* note 7, at 152.

<sup>71</sup> *Id.* at 153.

<sup>72</sup> CARRIE SCHWAB-POMERANTZ & CHARLES R. SCHWAB, *IT PAYS TO TALK: HOW TO HAVE THE ESSENTIAL CONVERSATIONS WITH YOUR FAMILY ABOUT MONEY AND INVESTING* 267 (2002).

in the worst cases, post-mortem litigation.<sup>73</sup> Therefore, it is highly advisable to utilize the holistic estate planning method whenever siblings (or other general classes of close relatives) will be treated inconsistently.<sup>74</sup>

Similarly, will contests are common when the estate or a substantial portion thereof is left to a non-relative individual or institution rather than to the testator's heirs.<sup>75</sup> An important subset of this category includes individuals with whom the testator has a committed, but non-marital, relationship.<sup>76</sup> Most states do not recognize common law or same sex marriages,<sup>77</sup> and such relationships are more likely to be disapproved of by family members.<sup>78</sup> This disapproval in and of itself may be enough to prompt a contest, especially considering that the existence of an illicit relationship between a testator and her beneficiary may be, in many instances, either implicitly or explicitly considered an important factor in determining whether or not undue influence has been exerted.<sup>79</sup>

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<sup>73</sup> See Street, *supra* note 7, at 141. Indeed, it is adult children who bring the majority of will contests: 71.3%. Spouses account for 13.2% of will contests. *Id.* at 142. See also Ronald Chester, *Should American Children Be Protected Against Disinheritance?*, 32 REAL PROP. PROB. & TR. J. 405, 410 (1997) (quoting JEFFREY P. ROSENFELD, *Disinheritance and Will Contests*, in FAMILY SYSTEMS AND INHERITANCE PATTERNS 75, 81 (Judith N. Cates and Marvin B. Sussman eds., 1982) ("Families face realignments in status and power whenever disinheritance occurs. There ensues a period of in-fighting and mutual recriminations which can drag on for months regardless of how much or how little was at stake.")).

<sup>74</sup> Street, *supra* note 7, at 152.

<sup>75</sup> Boggess, *supra* note 68, at § 3.

<sup>76</sup> See Schwab-Pomerantz, *supra* note 72, at 269.

<sup>77</sup> *Id.*

<sup>78</sup> For an example of such a will contest, see *In re Kaufmann's Will*, 247 N.Y.S.2d 664 (N.Y. App. Div. 1964). Kaufmann left the majority of his estate to an unrelated man, Weiss. *Id.* at 666. Although Weiss was never positively identified in the case as Kaufmann's sexual partner, the two men lived together for ten years, shared finances, and traveled extensively together during that time. *Id.* at 667. Kaufmann's brother clearly disapproved of the relationship, and contested the will on the basis of undue influence (*id.* at 668) despite Kaufmann's inclusion of a letter explaining his close relationship with Weiss and his reasons for the bequest. *Id.* at 671.

<sup>79</sup> *In Re Estate of Overton*, 417 N.W.2d 653, 656-57 (Minn.App. 1988) (trial court's finding of doctor's undue influence over testator-patient owing to their "mixed relationship of professional care, friendship, and romantic feelings" reversed after finding, among other things, that testator's romantic feelings were delusions of which doctor was unaware); *Reed v. Shipp*, 308 So.2d 705, 709 (Ala. 1975) ("The mere existence of illicit, improper, unlawful, or meretricious relations between the testator and the beneficiary or the beneficiary's mother is insufficient of itself to prove fraud or undue influence *although the existence of such relations is an important fact to be considered* by the jury along with other evidence of undue influence...and much less evidence will

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However, even when testamentary dispensations follow the typical statutory pattern and children are treated equally, a pre-mortem explanation of the proposed testamentary plan is not necessarily a bad idea.<sup>80</sup> Estate planners can often become preoccupied with the financial details involved in post-mortem transfers.<sup>81</sup> Although these details are important, they do not comprise the whole of an appropriate estate plan.<sup>82</sup> “Estate planning concerns death and taxes . . . [but it] is primarily about a larger subject, and that is people.”<sup>83</sup> Wills are primarily instruments for the transfer of financial assets, but they can just as easily be used to transfer familial values—ensuring that “children will assume as their own the values the parents promoted for a lifetime.”<sup>84</sup>

Holistic estate planning provides an ideal framework in which family values can be identified, discussed, and incorporated into the estate plan.<sup>85</sup> In

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*be required to establish undue influence on the part of one holding wrongful and meretricious relations with the testator.”*) (quoting 94 C.J.S. Wills § 253, at 1130) (emphasis added); *In Re Moses’ Will*, 227 So.2d 829, 836 (Miss. 1969) (“The sexual morality of the personal relationship is not an issue. However, the intimate nature of this relationship is relevant to...the extent that its existence, under the circumstances, warranted an inference of undue influence.”).

<sup>80</sup> See generally Schwab-Pomerantz, *supra* note 72.

<sup>81</sup> *Id.*

<sup>82</sup> See, e.g., *id.* at 266.

The highly technical nature of estate planning, which is rife with legal details and arcane language presents [an] obstacle [to its performance] but once you get past [this obstacle], estate planning is very much about human issues. After all, the whole point is for you to decide how you want to provide for the people and causes you care about most.

<sup>83</sup> Street, *supra* note 7, at 145; Williams, *supra* note 22, at 821, n.9 (both quoting JEROME A. MANNING, ESTATE PLANNING: HOW TO PRESERVE YOUR ESTATE FOR YOUR LOVED ONES xi (2d ed. 1992)).

<sup>84</sup> Gage et al., *supra* note 14, at 511 (Noting that “many estate planners recognize that to be effective, the financial and tax strategies they recommend must be designed in this broader context of personal and family needs.”). See also Schwab-Pomerantz, *supra* note 72, at 267 (“The same values that dictate your life (and all your financial plans) can shape your estate plan, thereby making it a proper exclamation point to a life well lived.”).

<sup>85</sup> A family with strong religious convictions might, for example, decide to designate a sizeable portion of the testator’s estate to their regular house of worship. Wealthy parents who feel strongly that their children must learn independence and hard work might choose to leave those children nominal amounts of a much larger fortune. Grandparents who wish to stress family-togetherness might bequeath a vacation property for the extended family to share. An aunt wishing to highlight the importance of education might leave assets in trust for her younger nieces to use for college or graduate

addition, bringing the entire family together to participate in the discussion of a testamentary transfer provides a model for adult children of an open and communicative family in which every member's thoughts and feelings are respected. Finally, raising and attempting to resolve latent or potential family controversies through non-judicial proceedings charges adult children to do the same when disagreements—whether or not they are probate in nature—arise after parents have died.<sup>86</sup>

When these more personal benefits are combined with the financial benefits reaped from the avoidance of will contests, the advantages of holistic estate planning become clear. However, many testators are still reluctant to engage in the process for fear of broaching topics often deemed “taboo” by society.<sup>87</sup> In order to overcome this obstacle, estate planners must first be familiar with its nature.

### III. WHAT MONEY MEANS

*“Don’t tell me what your priorities are. Show me where you spend your money and I’ll tell you what they are.”<sup>88</sup>*

– James W. Frick

It is universally acknowledged that one's personal finances are not an acceptable topic of dinner conversation.<sup>89</sup> In examining the basis for this precept, it is necessary to consider two factors. Firstly, individuals are often socialized to keep their personal finances silent simply because of the

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school. There is simply no end to the uses of testamentary assets or to the principles those assets can represent.

<sup>86</sup> See Gage et al., *supra* note 14, at 511:

Parents often want assurances that their children will feel fairly treated and will be able to work together harmoniously if the plans require cooperation (e.g., when they will co-own a family business or vacation property). Parents may also want assurances that the family will not descend into pettiness as they pass their money and possessions to the next generation and that the problems that have existed in family relationships will be resolved—or at least not exacerbated—during their final years.

<sup>87</sup> Schwab-Pomerantz, *supra* note 72, at 266 (“If there’s one thing we hate to talk about more than money, it’s death, whether our own or that of a loved one. Combine the two, and it’s no wonder we avoid making plans for the very capital we’ve worked so hard all our lives to amass.”). See also Street, *supra* note 7, at 157 (stating that the largest obstacle to holistic estate planning is testators, themselves, who attempt to “avoid any conflict” by springing surprise estate plans on their beneficiaries post-mortem).

<sup>88</sup> James W. Frick quotes, *available at* [http://thinkexist.com/quotes/james\\_w.\\_frick](http://thinkexist.com/quotes/james_w._frick).

<sup>89</sup> Schwab-Pomerantz, *supra* note 72, at 1.

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communal convention to do so.<sup>90</sup> It is considered distasteful to publicly discuss prices of purchased goods or individual salaries.<sup>91</sup> Such conversations can highlight embarrassing disparities in both the amount of disposable income different families have to spend and the manner in which they choose to do so. Individuals are loath to shed light on these disparities because the way in which financial resources are acquired and exhausted is inherently personal, and is often dictated as much by pecuniary attitudes adopted in childhood as it is by an individual's wants and needs.<sup>92</sup>

Secondly, even within the relatively private confines of the family, discussion of monetary issues is an extremely touchy subject.<sup>93</sup> This is so because—while a dollar lying in the street may be just a dollar—in an individual's hands, money is never just money.<sup>94</sup> Personal wealth is symbolic of many different things in American culture—power, autonomy, success, security, as well as failure, inadequacy, and dependency.<sup>95</sup> An individual's relationship with money is often entangled with his most profound emotional needs, fears, sense of self-worth, and identity.<sup>96</sup>

This fact, alone, ensures that broaching the topic of personal finances with family members will be a difficult endeavor. However, family relationships themselves can exacerbate this discomfort.<sup>97</sup> The American family is, in many respects, an economic unit.<sup>98</sup> Money must be generated by—and distributed to—its members, thus creating a system of financial relationships that often remain unspoken, ill defined, and inconsistent.<sup>99</sup>

Within this system, each transaction can assume a different meaning.<sup>100</sup> A mother might give her child ten dollars one week because of her parental obligation to provide for his school lunches.<sup>101</sup> The exact same transaction

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<sup>90</sup> Madanes, *supra* note 67, at 2.

<sup>91</sup> *Id.* While the origin of this custom is unknown, its roots are attributable to everything from Judeo-Christian teachings to Freudian psychology. *Timothy* 6:10. ("For the love of money is a root of all kinds of evil."). Madanes, *supra* note 67, at 3 ("To [Freud], money symbolized excrements, with disgusting and despicable connotations.").

<sup>92</sup> See Schwab-Pomerantz, *supra* note 72, at 7–9.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 7.

<sup>95</sup> See *id.* at 8.

<sup>96</sup> *Id.*

<sup>97</sup> See generally, Madanes, *supra* note 67.

<sup>98</sup> See generally, Heather L. Ross & Isabel V. Sawhill, *The Family As Economic Unit*, WILSON Q., Winter 1997, at 84–88.

<sup>99</sup> See Madanes, *supra* note 67, at 43.

<sup>100</sup> See *id.* at 45.

<sup>101</sup> See *id.*

would take on an entirely different meaning, however, if the mother gave her child ten dollars in exchange for shoveling snow from the driveway.<sup>102</sup> Within a family, money is given for a variety of reasons—obligation, generosity, guilt, work accomplished, or on the basis of entitlement<sup>103</sup>—but it is important to remember that because of each family member's unique attitude toward money, there is always a motive for its transfer,<sup>104</sup> and there are often strings attached to giving.<sup>105</sup>

Gift exchanges are particularly difficult to categorize because the party receiving money often perceives a certain motivation that does not correspond to the donor's true intent.<sup>106</sup> Hence, "[m]oney can be given for one reason and received with a very different interpretation of why the money was given."<sup>107</sup> A family history of conflict or resentment regarding particular issues—especially financial issues—can influence the recipient of a gift to suspect dubious motives for its donation.<sup>108</sup>

These misgivings are just as present when gifts are *not* given as when they are, particularly in a large family where members not party to a gift may also conjecture motivations for its donation and receipt that may or may not correspond to reality. Since love is typically expressed between family members in the form of material goods as well as affection,<sup>109</sup> giving

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> Madanes, *supra* note 67, at 42. See also *id.* at 27:

An invisible string ties parents and children together across time and distance. The string is even stronger when money is attached to it. Money is often a secret umbilical cord in the struggle of young adults for separation from their parents. Children use money covertly—how much they demand and what they do with it—to rebel and to exact retribution. Parents use money covertly—how much they give and what they want in exchange—to reject or to hold onto their children.

<sup>106</sup> Madanes, *supra* note 67, at 45.

<sup>107</sup> *Id.* For example, a father might give his son a car as a reward for his excellent grades. If the reason for the gift is not explained, the son might assume that his father is simply being generous, or, alternatively, that the "gift" is really an obligation to chauffeur his two younger siblings to after-school activities.

<sup>108</sup> See, e.g., Madanes, *supra* note 67, at 45; Schwab-Pomerantz, *supra* note 72, at 271. For example, a woman might present her sister with a shopping trip as a birthday present. The recipient might suspect this gift is an opportunity for her sister to covertly critique her current wardrobe. As an additional example, a son might wish to repay his parents for their financial support during his post-graduate schooling with a large sum of money. His parents might believe that their son fears they can no longer support themselves.

<sup>109</sup> Madanes, *supra* note 67, at 51.



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unequally to classes of family members can provoke hurt feelings, low self-esteem, envy, and hatred.<sup>110</sup>

Happily, many of the problems associated with giving and receiving money within the family are avoidable with clear communication.<sup>111</sup> Similarly, when family members understand the reasoning behind a testamentary scheme and have a hand in its development—even when this scheme is inherently unfair to them—they will be more inclined to accept it, and less inclined to challenge the estate plan in court.<sup>112</sup> This sort of communication is precisely the type that holistic estate planning attempts to encourage.

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<sup>110</sup> *Id.* Feelings of hurt and tension can become extreme when parents give to siblings unequally, as illustrated by the following case study:

Andrea came to see me [a noted family therapist] because she wanted to reconcile with her parents, to whom she hadn't talked for several years. "I have certain problems in my life," she said . . . "that lead me to believe that my father abused me sexually when I was a child. I don't have any memories of abuse, yet I suspect that he did, so I'm angry and I haven't talked to my parents in years" . . . The parents were appalled, shocked, bewildered. Both assured me there was no sexual abuse, no abuse of any kind . . . "We have reached an impasse," I said. "You think you were sexually molested, and your parents say there was no such thing . . . And I think that, whether or not there was sexual abuse, your father must have done something... that hurt you very much. So I think he needs to do reparation." ... Andrea flew into a rage. She screamed and raved that there was no reparation possible. ... After a while she dried her tears... "I want \$50,000," she said, to the surprise of everyone in the room. ... I began to negotiate for Andrea. As we talked, I understood that Andrea was angry because when her brother graduated from college, the father had given him \$50,000 to open a business. When Andrea graduated from college, he had given her nothing because she was a girl . . . . In Andrea's own particular method of accounting, she preferred to think that the parents owed her because of abuse than because they had favored her brother.

*Id.* at 52–54.

<sup>111</sup> Madanes, *supra* note 67, at 57 ("Distribute money equitably among your children. If you give more to one than to the others, be very clear with them about why. ... If you don't talk openly about money, even when you are fair, your children won't know it."). See also Gage, *supra* note 14, at 529–30; *supra* text accompanying note 28 (detailing the hurt and estrangement that could have been avoided between two siblings had a mother divulged the reasoning behind her plan to bequeath her entire estate to only one of her children); Schwab-Pomerantz, *supra* note 72, at 7 ("[N]ot communicating about financial matters, from spending to investing to planning for the future is an almost surefire way to undermine a relationship.").

<sup>112</sup> Gage, *supra* note 14, at 533. See also Madanes, *supra* note 67, at 57.

However, because money and its personal connotations are so difficult for most families to discuss,<sup>113</sup> the largest obstacle to the holistic estate planning process is convincing the testator that the benefits of the process outweigh its potential for emotional upheaval within the family.<sup>114</sup> It is the duty of the proficient estate attorney to ensure that this balance weighs in favor of holistic estate planning. The remainder of this note offers practical tips in obtaining this result.

#### IV. THE ART OF PERSUASION

*"He who has the truth at his heart need never fear the want of persuasion on his tongue."*

— John Ruskin<sup>115</sup>

Estate planners have an obligation to encourage those testators with potentially contentious estate plans to approach the estate planning process holistically, incorporating pre-mortem mediation tactics to resolve family conflicts before these conflicts blossom into will contests.<sup>116</sup> "Use of an independent mediator during the planning process can help estate planners improve client satisfaction, reduce the probability of family litigation[,] and avoid malpractice claims."<sup>117</sup>

However, attorneys specializing in estate planning have other professional duties, as well. Attorneys must defer decisions regarding the ultimate objectives of the estate plan—in addition to the means by which those objectives are achieved—to the testator.<sup>118</sup> Consequently, regardless of an attorney's personal preference for the holistic estate planning process, he

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<sup>113</sup> Schwab-Pomerantz, *supra* note 72, at 7 ("So why, despite the obvious payoff and the equally obvious price of avoidance, do most people neither initiate nor participate in these essential family conversations about money?").

<sup>114</sup> See Gage, *supra* note 14, at 516–17.

<sup>115</sup> JOHN RUSKIN, THE STONES OF VENICE: INTRODUCTORY CHAPTERS AND LOCAL INDICES (PRINTED SEPARATELY) FOR THE USE OF TRAVELLERS WHILE STAYING IN VENICE AND VERONA, VOLUME II 130 (3d ed., George Allen 1881).

<sup>116</sup> Gromala, *supra* note 41, at 31 ("The Estate Planning Bar should consider recommending professional mediators as part of the scope and quality of service they offer their clients. Estate planners have an opportunity to help estate planning mediation develop in a manner most useful to clients and professionals.").

<sup>117</sup> *Id.* at 29.

<sup>118</sup> ABA Model Rules of Professional Conduct, Rule 1.2 (2010 Ed) ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued.").

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must convince each new client of its advantages before he will be able to use it.

Such persuasion is potentially difficult in light of the reluctance most individuals have to discussing money in its more personal incarnations, and the thought of their own—or a close relative's—death.<sup>119</sup> Nevertheless, with the proper tools at their disposal, estate planners not only can overcome social squeamishness on the subjects of money and mortality, but also can orient clients toward the holistic estate planning process.

### A. *Preparing*

Estate planners who wish to urge clients toward a holistic approach to estate planning should begin the process by setting the proper tone in their initial interview with a prospective testator.<sup>120</sup> Such interviews traditionally serve to inform the estate planner of the client's wishes, and typically end with recommendations regarding the next stage of the process.<sup>121</sup> “Whether intentionally or not, the attorney's questions [during the initial interview] signal to the clients the appropriate content of the planning process.”<sup>122</sup>

Too often, however, initial interviews narrowly focus on the financial composition of the estate and the goals elicited from clients during this conference relate solely to monetary transfer.<sup>123</sup> Certainly, making appropriate financial preparations for loved ones is an aspect of proper estate planning, as are the more tangled arrangements executed for the purpose of tax planning. However, estate planners can often become preoccupied with these fiscal particulars.<sup>124</sup> While necessary to discuss in a preliminary interview, these details should be accompanied by a corresponding focus on the domestic consequences likely to accompany wealth transfer at death.<sup>125</sup>

Questions that will orient parents to the holistic estate planning process will not merely maintain a narrow focus on finances and methods of tax

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<sup>119</sup> See generally *supra*, Part III.

<sup>120</sup> See Gage, *supra* note 14, at 530 (“The initial interview between client and attorney is a critical time for defining the client's understanding, expectations, and wishes for the process ahead.”).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> See generally Schwab-Pomerantz, *supra* note 72.

<sup>124</sup> *Id.*

<sup>125</sup> See, e.g., Schwab-Pomerantz, *supra* note 72, at 266. See also *supra* text accompanying note 81.

avoidance,<sup>126</sup> but will incorporate broader topics such as family and the personal goals parents hope to accomplish through bequests to their children.<sup>127</sup> Simply broaching these subjects in an initial interview will help clients “appreciate the full range of issues they will need to address” during the estate planning process—issues that will involve and affect the entire family unit for perhaps many years to come.<sup>128</sup> Once parents understand the full impact of their estate planning decisions, they will be more amenable to an estate plan that operates holistically, incorporating the hopes, fears, values, and relationships that define their distinctive family unit.<sup>129</sup>

Once clients have been introduced to the idea that non-financial considerations are intrinsic to estate planning, it is necessary to inform them of the holistic process itself. Since holistic estate planning is a relatively new practice,<sup>130</sup> clients will likely be unaware of its existence, and will certainly need to be apprised of its procedures and objectives before they agree to this course of action.<sup>131</sup> This novelty, however, is a boon to the careful estate planner—explaining the process to a new audience for the first time allows him to present it in the most favorable light possible.<sup>132</sup>

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<sup>126</sup> Gage, *supra* note 14, at 530 (“A narrow, financially focused interview conveys the sense that estate planning should be narrowly defined.”). For a discussion of the proper topics to be addressed in an appropriately broad interview, see *supra* text accompanying note 64. Gage’s article suggests several actual questions, including:

What are [parents’] concerns for themselves as a couple and for each other? What are [parents’] hopes and fears for their children? What values would they like to see their children embrace after they have passed away? . . . Does either parent have concerns about the spousal relationship as the estate is planned? How do the parents think their children’s relationships with one another will be affected by their planning?

Gage, *supra* note 14, at 531.

<sup>127</sup> *See id.* at 531.

<sup>128</sup> *Id.*

<sup>129</sup> *See id.* at 531.

<sup>130</sup> Gromala, *supra* note 41, at 31.

<sup>131</sup> For a detailed explanation of the holistic estate planning process, as well as a discussion of some of the situations in which this process is best utilized, see *supra* Part II.

<sup>132</sup> In 1925, Frederick Hansen Lund presented the law of primacy in persuasion. Lund’s theory asserts that regardless of which side of an issue is presented first, that side will be assigned greater credibility by the listener than any subsequent position. For a more in-depth explanation of this concept, see generally Frederick Hansen Lund, *The Psychology of Belief IV: The Law of Primacy in Persuasion*, 20 JOURNAL OF ABNORMAL SOCIAL PSYCHOLOGY 183 (1925).

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A thorough explanation of the holistic estate planning process can easily highlight its benefits.<sup>133</sup> While explaining each step to a client, an attorney can also make clear why the step should be taken, and the benefits associated with its completion.<sup>134</sup> Individuals are much more likely to take actions or acquiesce to favors when they have a reason for doing so.<sup>135</sup> In fact, individuals are much more likely to respond favorably to inquiries even when the reason given for doing so is inane or irrelevant.<sup>136</sup> However, the motivations for using holistic estate planning process are neither inane nor irrelevant. Each one logically reinforces the holistic procedure, and even those clients who do not wish to participate further will clearly see the benefits of its use in certain situations.

One particularly effective way of explaining the process and its benefits in a way that testators will respond to is through the use of storytelling techniques.<sup>137</sup> Because stories, particularly interesting stories, make an

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<sup>133</sup> For a recitation of each step in this process, the reasoning behind it, and the benefits associated both with each step and the entire process as a whole, see *supra* Part II.

<sup>134</sup> For example, while explaining the caucus step of the holistic estate planning process, an estate attorney would want to explain that this step is taken to make sure that each family feels completely free to express his hopes and fears for the estate plan without fear of reprisal from other family members. In justifying the process comprehensively, an attorney would want to point out its assistance in preventing future will contests, and the peace of mind it provides to parents. For more of holistic estate planning's advantages, see *supra* Parts II, III.

<sup>135</sup> ROBERT B. CIALDINI, *INFLUENCE: THE PSYCHOLOGY OF PERSUASION* 4, Collins Business (Revised ed., 2007).

<sup>136</sup> KEVIN HOGAN, *THE PSYCHOLOGY OF PERSUASION: HOW TO PERSUADE OTHERS TO YOUR WAY OF THINKING* 78–79 (2007). Consider the following sociological study detailed in Hogan's book:

Ellen Langer, a Harvard social psychologist, performed a fascinating experiment in 1977. She asked a favor of people waiting in line to use the library's copy machine. When she asked, "Excuse me, I have five pages. May I use the machine, *because I'm in a rush?*" 94 percent let her move ahead in line. When the request was phrased without those last five words, only 60 percent let her move ahead in line. Most fascinating of all, however, was that when she asked, "Excuse me, I have five pages. May I use the machine *because* I have to make some copies?" 93 percent let her move ahead in line with no reason other than *because!*

See also Cialdini, *supra* note 135, at 4–5. To view the original study itself, see generally Ellen J. Langer, *Minding Matters*, 22 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY*, Academic Press (L. Berkowitz, ed., 1989).

<sup>137</sup> See RICHARD MAXWELL & ROBERT DICKMAN, *THE ELEMENTS OF PERSUASION: USE STORYTELLING TO PITCH BETTER, SELL FASTER, AND WIN MORE BUSINESS* 1 (2007) ("We tell stories because . . . stories are how we as human beings organize our minds.").

indelible impression on the human brain,<sup>138</sup> storytelling is an incredibly effective tool for conveying new concepts and persuading others of their importance.<sup>139</sup>

Luckily for the estate planner—although less so for the parties involved—probate law is filled with fascinating stories filled with sibling rivalry, greed, jealousy, wealth, celebrities, and courtroom drama.<sup>140</sup> However, even the most captivating narratives should be structured in a way

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<sup>138</sup> *Id.* at 4:

[S]torytelling is innate in the human psyche. It is something we all know how to do. In fact, it is so hardwired into us that it has its own place on our genome—a gene called FOXP2. Discovered in 2001 by Professor Anthony Monaco and his research team at Oxford University, FOXP2 is now thought to be only the first of what scientists believe is a whole constellation of genes that make language and narrative possible. FOXP2 specifically makes possible the subtle physical and neurological skills needed to speak words rapidly and precisely, and is probably linked to the use of complex syntax as well. From a cellular level on up, we are all born storytellers.

To view Monaco's research, see Cecilia S. Lai, et. al., *A Forkhead-Domain Gene is Mutated in a Severe Speech and Language Disorder*, 413 NATURE 519 (2001).

<sup>139</sup> See Maxwell & Dickman, *supra* note 137, at 4:

For those of us whose business depends on being able to persuade others—which is all of us in business—the key to survival is being able to cut through all that clutter and make the sale. The good news is that the secret of selling is what it has always been—a good story.

<sup>140</sup> See, e.g., *The Will: Family Secrets Revealed*, *supra* note 3. See also *supra* text accompanying note 24; *supra* text accompanying note 26; *supra* text accompanying note 78; *supra* text accompanying note 110. Consider, also, the media attention garnered by “celebrity” will contests by the likes of Anna Nicole Smith (See generally Joanna Grossman, *Anna Nicole Smith Wins at the Supreme Court: She's Closer to Collecting From Her Late Husband's Estate, But Many Hurdles Still Remain*, May 16, 2006, FIND LAW, available at <http://writ.news.findlaw.com/grossman/20060516.html>); Brooke Astor (See generally Serge F. Kovaleski, *Brooke Astor's Last Will and Testament*, Aug. 15, 2007, NEW YORK TIMES CITY ROOM, available at <http://cityroom.blogs.nytimes.com/2007/08/15/brooke-astors-last-will-and-testament>); Michael Jackson (See generally Joel A. Schoenmeyer, *Michael Jackson's Estate, Part 6—Will Contest?*, July 22, 2009, DEATH AND TAXES, available at [http://www.deathandtaxesblog.com/2009/07/michael\\_jacksons\\_estate\\_part\\_6\\_1.html](http://www.deathandtaxesblog.com/2009/07/michael_jacksons_estate_part_6_1.html)); Leona Helmsley (See generally *Leona Helmsley's Dog Finds Itself 5,000,000 Pounds Poorer After Late Billionaire's Grandchildren Contest her Will*, June 16, 2008, DAILY MAIL ONLINE, available at <http://www.dailymail.co.uk/news/article-1026956/Leona-Helmsleys-dog-finds-5m-poorer-late-billionaires-grandchildren-contest-will.html>); Howard Hughes (See generally, Joel A. Schoenmeyer, *Will Contests, Part 3: Melvin Dumar and Howard Hughes*, Aug. 11, 2005, DEATH AND TAXES, available at [http://www.deathandtaxesblog.com/2005/08/will\\_contests\\_part\\_3\\_melvin\\_du.html](http://www.deathandtaxesblog.com/2005/08/will_contests_part_3_melvin_du.html)).

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that enhances their persuasive qualities.<sup>141</sup> The most effective stories contain five distinct elements: passion, a hero, an antagonist, awareness, and transformation.<sup>142</sup> Although the passion element—that piece of the story that makes it interesting and memorable<sup>143</sup>—is fairly self-explanatory, the other elements of a persuasive story require some clarification.

The hero “grounds the story in . . . reality” by providing a point of view for the audience.<sup>144</sup> Since the audience of any estate planner will be potential testators, the hero must be relatable.<sup>145</sup> This is hardly a problem for estate planners, however, as probate law is littered with tales of well-meaning parents foiled by confusion and misunderstanding.<sup>146</sup> “Antagonists, and the conflict they represent for the hero, are the beating heart at the center of [a story],” however, an antagonist need not be a person.<sup>147</sup> In the estate planning process, the antagonist of every “story” is the poor planning and confusion that lead to later will contests.

Awareness, the element of a story that allows its hero to prevail,<sup>148</sup> is represented in this schema by the knowledge that estate plans can and do go wrong without prior communication about their contents. “Awareness is not always easy or comfortable, but if [stories are] to make a difference, [awareness] always has to be there.”<sup>149</sup> The holistic estate planning process itself embodies transformation, which is the action taken to overcome the obstacle of which the hero has become aware.<sup>150</sup>

Thus, by incorporating stories into their conversations with prospective testators and structuring those stories in this particular way, estate planners

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<sup>141</sup> Maxwell & Dickman, *supra* note 137, at 8–9.

<sup>142</sup> *Id.* at 10.

<sup>143</sup> *See id.* at 10–11.

<sup>144</sup> *Id.* at 13.

<sup>145</sup> *Id.* at 13–14:

The hero’s vision of the world creates the landscape that the audience enters. For the audience to identify with the hero’s point of view, they must feel a little piece of themselves in the hero’s situation, so part of the hero’s function is to create a sense of equality with the audience. We need to feel comfortable walking in the hero’s shoes.

<sup>146</sup> *See, e.g., supra* text accompanying note 26; *supra* text accompanying note 107.

<sup>147</sup> Maxwell and Dickman, *supra* note 137, at 15–16.

<sup>148</sup> *Id.* at 19.

<sup>149</sup> *Id.* at 21.

<sup>150</sup> *Id.* at 21–22.

not only will dramatically increase their powers of persuasion, but also will effectively direct clients toward the holistic estate planning process.<sup>151</sup>

### B. Connecting

Of course, all the stories in the world will not help to convince potential testators to use the holistic estate planning process when they feel that their individual or family situation is somehow different from other individuals who might have benefited from the process. Individuals often decide upon the proper course of behavior by observing the behavior of others.<sup>152</sup> This is especially true when the decisionmaker views others exhibiting the behavior as similar to himself.<sup>153</sup> Since holistic estate planning is a relatively new process,<sup>154</sup> clients will not likely have heard about it from friends or relatives, and potential testators may feel very far removed from celebrities or business magnates whose family litigation has been heavily publicized.<sup>155</sup>

Estate planners can bridge this psychological distance in two ways. Firstly, they can emphasize the similarities between the family situations of better-known testators with contentious estates and the family situations of their clients. Secondly, after a practice begins to see a significant increase in

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<sup>151</sup> See *id.* at 4.

<sup>152</sup> Cialdini, *supra* note 135, at 142.

<sup>153</sup> *Id.* Cialdini's book describes a fascinating psychological study:

More compelling evidence for the importance of similarity in determining whether we will imitate another's behavior comes from scientific research. [In one study] researchers placed wallets on the ground in various locations around midtown Manhattan . . . the wallet contained a letter that made it evident that the wallet had been lost not once, but twice. The letter was written to the wallet's owner from a man who had found it earlier and whose intention was to return it. . . . [T]he wallet was wrapped in an envelope addressed to the owner. . . . Before they dropped the wallets, however, the researchers varied one feature of the letter it contained. Some of the letters were written in standard English by what seemed to be an average American, while the other letters were written in broken English by the first finder, who identified himself as a recently arrived foreigner. In other words, the person who had initially found the wallet and tried to return it was depicted by the letter as being either similar or dissimilar to most Americans. . . . Only 33 percent of the wallets were returned when the first finder was seen as dissimilar, but fully 70 percent were returned when he was thought to be a similar other.

*Id.* at 140-42. For the original study, see generally Harvey A. Hornstein, et. al., *Influence of a Model's Feeling About His Behavior and His Relevance as a Comparison Other on Observers' Helping Behavior*, 10 JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY 222 (1968).

<sup>154</sup> Gromala, *supra* note 41, at 31.

<sup>155</sup> See, e.g., *supra* text accompanying note 140.



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its holistic estate planning arrangements, attorneys can inform new clients that many families just like them are successfully executing the process. Knowing that others similar to themselves have used this technique will greatly encourage potential testators to do so, too.<sup>156</sup>

Again, the real difficulty in encouraging potential testators to use holistic estate planning is not in persuading clients that the method is helpful in certain circumstances—even circumstances that bear similarities to their own. They are almost certain to agree with this representation after a careful explanation of the process, particularly one that makes use of the persuasive techniques discussed above. Rather, it is persuading clients that the method will be helpful *to them*, to a family *in their situation*.

The thought that one's children could dissolve into messy post-mortem litigation over the family estate is not a pleasant one. There is a profound desire among testators—even those who do or should fear this turn of events—to deny that it is a possibility.<sup>157</sup> It probably doesn't help that, for the most part, they are correct. For every beneficiary willing to use the judicial system to rectify perceived family slights, there are a dozen more willing to overlook those slights (even at the peril of the testator's intentions) in the interest of preserving family harmony and/or wealth.

Discussing holistic estate planning in purely prophylactic terms, however, neglects the process' great potential to improve the end-of-life plans of even those testators who can safely expect no post-mortem litigation. In discussing this potential, Gage notes:

The estate planning process is the closest thing our society has to a rite of passage to the final stage of life. Many people who are beginning to deal with their own mortality need assistance preparing for the transfer of their tangible assets upon death. They also may need help in defining the terms of the rest of their own lives and encouragement in taking steps to enhance their personal relationships with the people they love. Parents need to believe they can improve the likelihood that their children will have better—not worse—relationships as a result of their estate plans.<sup>158</sup>

In his article, Gage cites the work of Erik Erickson, a psychologist who has proposed that older adults are in a developmental stage known as “Late Adulthood,” a period in which they reflect on their lives, attempting to

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<sup>156</sup> Cialdini, *supra* note 135, at 142.

<sup>157</sup> My mother's first comment after reading an early draft of this paper: “We don't need to do this, right?” My father had a similar reaction. *See also supra* text accompanying note 26.

<sup>158</sup> Gage, *supra* note 14, at 513.

achieve a sense of purpose and fulfillment.<sup>159</sup> Successful transfer of those assets—both economic and sentimental—that parents have created over the course of many years helps them to find meaning in life's late stages.<sup>160</sup>

While parents may feel some sense of purpose and fulfillment in making arrangements that will be revealed post-mortem, they will surely feel more rewarded by discussing those arrangements with beneficiaries in person, receiving assurances that their assets will be transferred correctly, evidence that their beneficiaries can work together in effecting this transfer, and gratitude for their gifts. This is doubly true where testators express a wish to communicate through testamentary instruments. Testators often use their wills to share life lessons or memories, reach out to estranged family members, or explain their testamentary plans, whether by including letters or making gifts that have a sentimental meaning or a special significance.<sup>161</sup> These communications can more effectively be made in person, when the testator can derive fulfillment from the interaction. Furthermore, by communicating indirectly, testators are, to some extent, leaving what may be important information to chance.<sup>162</sup>

The holistic estate planning process can also be a strengthening experience for the family unit. Not only can the conversations necessitated by the process broach and attempt to resolve longstanding family disputes or misunderstandings, family members can also “discuss what it means to them to be a family, what is important to them as a family, what their values are,

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<sup>159</sup> *Id.* at 516 (citing Erik Erikson, *Identity and the Life Cycle*, in *PSYCHOLOGICAL ISSUES* (George S. Klein ed. 1959)).

<sup>160</sup> *Id.* at 516. By contrast, unsuccessful transfers “can backfire and actually worsen an older person’s sense of integrity and connection. In the worst case, transferring assets can be a destructive family experience. Even the fear that it may be destructive can lead to feelings of despair.” *Id.*

<sup>161</sup> *Id.* at 518.

<sup>162</sup> *Id.* at 518 (“While some people try to accomplish such goals by leaving notes in their wills or leaving unusually significant gifts, these indirect approaches leave important communications to chance. *The testator never knows with certainty whether the beneficiary will get the point.*”) (emphasis added). See also *supra* text accompanying note 77 and *In re Kaufmann’s Will*, 20 A.D. 2d 464 (N.Y.A.D. 1964). With his will, Kaufmann left a detailed letter to his family explaining his relationship with Weiss, and the reasons for his testamentary disposition: “What could be more wonderful than a fruitful, contented life and who more deserving of gratitude now, in the form of an inheritance, than the person who helped most in securing that life?” *Id.* at 470. The letter was an attempt to avert a will contest from Kaufmann’s family, who had quarreled with Weiss for years. See *id.* at 467–68. Obviously, this attempt at reconciliation failed.

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and how they can help one another to achieve their individual and collective goals.”<sup>163</sup>

By highlighting the positive—rather than preventative—aspects of holistic estate planning, even those testators who do not anticipate post-mortem litigation may see the benefits of using the process, with the additional advantage that if any conflicts do come up,<sup>164</sup> they will be resolved during the process rather than through later litigation. Stressing the positive characteristics of holistic estate planning also permits clients to acquiesce to the process without acknowledging—even to themselves—that their family may not handle an estate’s execution without some level of conflict.

## V. CONCLUSION

Holistic planning is one of the most effective ways to safeguard estate plans against will and inheritance contests,<sup>165</sup> litigation that can devastate family relationships<sup>166</sup> as well as the family wealth attached to an estate.<sup>167</sup> Estate planners have an obligation to encourage those testators with potentially contentious estate plans to approach the estate planning process holistically, incorporating pre-mortem mediation tactics to resolve family conflicts before these conflicts blossom into will contests.<sup>168</sup>

However, because money and its personal connotations are so difficult for most families to discuss,<sup>169</sup> the largest obstacle to the holistic estate planning process is convincing the testator that the benefits of the process outweigh its potential for emotional upheaval within the family. Such persuasion is potentially difficult in light of the reluctance most individuals have to discussing money in its more personal incarnations, and the thought of their own, or a close relative’s, death.<sup>170</sup>

Nevertheless, by laying the proper foundation in an initial interview with clients,<sup>171</sup> informing clients of the potential benefits of the process,<sup>172</sup> using

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<sup>163</sup> Gage, *supra* note 14, at 532.

<sup>164</sup> And they will: “although reluctant to admit it, most families have secrets—some emotionally charged bits of information to which not everyone is privy or aware.” *Id.* at 527.

<sup>165</sup> *Id.* at 510–11.

<sup>166</sup> Chester, *supra* note 8, at 409–10.

<sup>167</sup> Love, *supra* note 9, at 258.

<sup>168</sup> Gromala, *supra* note 41, at 31. *See also supra* text accompanying note 116.

<sup>169</sup> Schwab-Pomerantz, *supra* note 72, at 7.

<sup>170</sup> *See generally supra* Part III.

<sup>171</sup> *See generally supra* subpart IV (A).

storytelling techniques to explain the process memorably,<sup>173</sup> emphasizing the similarities between the client's family situation and those of others who have—or might have—benefited from the holistic planning process,<sup>174</sup> and stressing the positive as well as the preventative aspects of the process,<sup>175</sup> attorneys can overcome this social squeamishness, orienting clients toward the holistic estate planning process.

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<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *See generally supra* Part IV.B.

<sup>175</sup> *Id.*